

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

STEVEN KOZLOWSKI and  
MICHELLE KOZLOWSKI,

## Plaintiffs,

Case No. 3:14-cv-00218-MMD-WGC

**REPORT & RECOMMENDATION OF  
U.S. MAGISTRATE JUDGE**

v.

THE STATE OF NEVADA, et. al.,

## Defendants.

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Plaintiffs' Amended Complaint. (Doc. # 8.)<sup>1</sup>

## I. BACKGROUND

Plaintiffs originally filed their application to proceed in forma pauperis (Doc. # 1) and pro se complaint (Doc. # 1-1) on April 23, 2014. The court issued an order granting the application to proceed in forma pauperis and screened the complaint pursuant to 28 U.S.C. § 1915 on May 14, 2014. (Doc. # 4.) In the original complaint, Plaintiffs named thirty-four defendants whom they assert allegedly denied their rights under the Americans with

<sup>1</sup> Refers to court's docket number. The court again acknowledges Plaintiffs' request that documents related to this case be in Arial 16 point font and double-spaced due to Mr. Kozlowski's claim that he is vision-impaired. With the exception of this footnote and the caption, the document comports with that request.

1      Disabilities Act (ADA). The complaint referenced an incident that  
2      occurred on August 22, 2009, concerning Mr. Kozlowski, and then  
3      stated that during the same time Ms. Kozlowski's rights under the  
4      ADA were violated. (Doc. # 1-1 at 5.) The complaint contained *no*  
5      *factual allegations* describing or otherwise informing the  
6      defendants how their rights under the ADA were violated. Nor was  
7      it clear whether Plaintiffs were alleging violation of their rights  
8      under Title I of the ADA, in the employment context, or under Title  
9      II of the ADA, prohibiting discrimination against those with  
10     disabilities in the provision of services, programs and activities  
11     provided by a public entity. Therefore, the court dismissed the  
12     action without prejudice, giving Plaintiffs leave to amend and  
13     instructing Plaintiffs that any amended complaint must contain  
14     factual allegations that demonstrate a plausible claim for relief.  
15     (Doc. # 4.)

16       Plaintiffs have now filed their amended complaint, which the  
17     court will now screen pursuant to 28 U.S.C. § 1915. (Doc. # 8.)

## 18                    **II. SCREENING**

### 19                    **A. Standard**

20       28 U.S.C. § 1915 provides: "the court shall dismiss the case  
21     at any time if the court determines that...the action or appeal (i) is  
22     frivolous or malicious; (ii) fails to state a claim upon which relief  
23     may be granted; or (iii) seeks monetary relief against a defendant  
24     who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii).  
25     This provision applies to all actions filed in forma pauperis,  
26     whether or not the plaintiff is incarcerated. See *Lopez v. Smith*,  
27     203 F.3d 1122, 1129 (9th Cir. 2000) (en banc); see also  
28     *Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

1 Dismissal of a complaint for failure to state a claim upon  
2 which relief may be granted is provided for in Federal Rule of Civil  
3 Procedure 12(b)(6), and this court applies the same standard  
4 under Section 1915(e)(2)(B) when reviewing the adequacy of the  
5 complaint or amended complaint. See *Resnick v. Hayes*, 213  
6 F.3d 443, 447 (9th Cir. 2000) (citation omitted). Review under  
7 12(b)(6) is essentially a ruling on a question of law. See *Chappel*  
8 *v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000).

9 In reviewing the complaint under this standard, the court  
10 must accept as true the allegations of the complaint, *Hosp. Bldg.*  
11 *Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976), construe  
12 the pleadings in the light most favorable to plaintiff, and resolve all  
13 doubts in the plaintiff's favor, *Jenkins v. McKeithen*, 395 U.S. 411,  
14 421 (1969). Allegations in pro se complaints are held to less  
15 stringent standards than formal pleadings drafted by lawyers, and  
16 must be liberally construed. See *Hughes v. Rowe*, 449 U.S. 5, 9  
17 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per  
18 *curiam*); *Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011).

19 A complaint must contain more than a "formulaic recitation of  
20 the elements of a cause of action," it must contain factual  
21 allegations sufficient to "raise a right to relief above the  
22 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,  
23 555 (2007). "The pleading must contain something more...than...a  
24 statement of facts that merely creates a suspicion [of] a legally  
25 cognizable right of action." *Id.* (quoting 5 C. Wright & A. Miller,  
26 Federal Practice and Procedure § 1216, at 235-36 (3d ed.  
27 2004)). At a minimum, a plaintiff should state "enough facts to  
28 state a claim to relief that is plausible on its face." *Id.* at 570; see

1       also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

2       A dismissal should not be without leave to amend unless it is  
3       clear from the face of the complaint that the action is frivolous and  
4       could not be amended to state a federal claim, or the district court  
5       lacks subject matter jurisdiction over the action. See *Cato v.*  
6       *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (dismissed as  
7       frivolous); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

8       **B. Discussion**

9       The amended complaint names twenty-nine defendants,  
10      including the State of Nevada, Douglas County, the Douglas  
11      County Sheriff's Office, the Washoe County Sheriff's Office,  
12      various "agents" of the Douglas County Sheriff's Office, the  
13      Attorney General of the State of Nevada, attorneys from the  
14      Douglas County District Attorney's Office, judiciary members,  
15      court-appointed attorneys and a private attorney. (Doc. # 8 at  
16      5-13.)

17       The amended complaint asserts that various defendants  
18      encountered Mr. Kozlowski on "a public byway" on August 22,  
19      2009, and failed to ascertain whether his strange behavior was  
20      the result of a disability. (Doc. # 8 at 13-14.) The amended  
21      complaint goes on to allege that there had been an attempt to  
22      murder Mr. Kozlowski and he was transported by helicopter to  
23      Renown Hospital in Reno, Nevada. (*Id.* at 14.) The amended  
24      complaint then asserts that Mr. Kozlowski was in a rehabilitation  
25      unit at Renown, when Jonathan Storke "tamper[ed] with an  
26      electrical [sic] device for memory of Mr. Koslowski, thus  
27      damaging Plaintiff's recording of the session." (*Id.* at 15.) He  
28      mentions being questioned by this investigator outside the

1 presence of an attorney. (*Id.*) Plaintiff contends “half of the  
2 ‘session’ was destroyed” in violation of the ADA. (*Id.*)

3 Next, the amended complaint claims that on March 7, 2010,  
4 while at their residence, provided various information to the  
5 Douglas County Sheriff’s Office, and then the Douglas County  
6 Sheriff’s Office and Daniel J. Coverly, violated the ADA by failing  
7 to make efforts at the time of their encounter with Plaintiffs to  
8 determine whether their behavior was the result of a disability. (*Id.*  
9 at 16.) Plaintiff also makes reference to John T. Harker. (*Id.*)

10 Plaintiffs contend that the First Judicial District Court then  
11 ordered Mr. Kozlowski to undergo a competency evaluation to  
12 determine whether he could complete a criminal proceeding and  
13 determine what services would be required. (*Id.* at 16-17.) It was  
14 reported that Mr. Kozlowski needed a note-taker to participate in  
15 criminal proceedings. (*Id.*) Plaintiffs then conclude that from  
16 March 8, 2010 to the present, his rights under the ADA were  
17 violated by the State of Nevada, Washoe County Sheriff’s Office,  
18 Karen Dustman, Catherine Cortez Masto, Jim A. Early, Matthew  
19 Ence, Michael Gibbons, Thomas Gregory, Jamie C. Henry, Lee t.  
20 Hotchkin, Jr., Kathy Jackson, and Mark Jackson. (*Id.*)

21 Plaintiffs then aver again that Defendants failed to take  
22 appropriate steps to determine whether Plaintiffs’ strange  
23 behavior was the result of a disability. (*Id.* at 18.) Plaintiffs then  
24 mention that they were made to wait outside in the extreme hot of  
25 summer and extreme cold of winter to communicate with law  
26 enforcement, and were denied services of the Douglas County  
27 Sheriff’s Office. (*Id.*)

28 The court finds that Plaintiffs fail to state any plausible claim

1 for relief. To the extent they are attempting to state a claim under  
2 Title II of the ADA, they have alleged that they have been  
3 determined by the Social Security Administration as having a  
4 physical or mental impairment that limits one or more major life  
5 activities. (Doc. # 8 at 4-5.) They have not alleged, however, how  
6 they are disabled or that their disability comes within the definition  
7 of the term in the ADA. Moreover, even liberally construing the  
8 allegations of the amended complaint, the court cannot conclude  
9 that Plaintiffs have included factual allegations that indicate their  
10 rights have been violated under Title II of the ADA, *i.e.*, that they  
11 were denied services, programs or activities by a public entity.  
12 Plaintiffs' allegations are difficult to follow and do not make logical  
13 sense. In addition, they name various defendants who could not  
14 be construed as state actors. For these reasons, the amended  
15 complaint should be dismissed. Plaintiffs have been already been  
16 given an opportunity to correct the deficiencies of their action and  
17 have failed to do so. Therefore, the dismissal of this action  
18 should be with prejudice.

19 **III. RECOMMENDATION**

20 **IT IS HEREBY RECOMMENDED** that Plaintiffs' Amended  
21 Complaint be **DISMISSED WITH PREJUDICE**.

22 **IT IS FURTHER RECOMMENDED** that Plaintiffs' Motion for  
23 Service of Summons by United States Marshal (Doc. # 9) be  
24 **DENIED AS MOOT**.

25 Plaintiffs should be aware of the following:

26 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C)  
27 and Rule IB 3-2 of the Local Rules of Practice, specific written  
28 objections to this Report and Recommendation within fourteen

1 days of receipt. These objections should be titled "Objections to  
2 Magistrate Judge's Report and Recommendation" and should be  
3 accompanied by points and authorities for consideration by the  
4 District Court.

5 2. That this Report and Recommendation is not an  
6 appealable order and that any notice of appeal pursuant to Rule  
7 4(a)(1) of the Federal Rules of Appellate Procedure should not be  
8 filed until entry of the District Court's judgment.

9 August 25, 2014  
10

11   
12

13 WILLIAM G. COBB  
14 U.S. MAGISTRATE JUDGE  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28